United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-7307

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

AL DAYON, individually and on behalf of MASTERCRAFT ELECTRONICS CORP.,

Plaintiff-Appellant,

-against-

THE HONORABLE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, THE HONORABLE HAROLD A. STEVENS, THE HONORABLE THEODORE R. KUPFERMAN, THE HONORABLE GEORGE TILZER, THE HONORABLE AARON STEUER AND THE HONORABLE EMILIO NUNEZ, JUSTICES OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT,

Defendants-Appellees,

THE HON. VINCENT A. MASSI, JUSTICE OF THE SUPREME COURT OF THE STATE OF NEW YORK, NEW YORK COUNTY, DOWNE COMMUNICATIONS, INC., EDWARD R. DOWNE, JR., WILLIAM H. KEHL, as Sheriff of the City of New York, and THE AETNA CASUALTY AND SURETY COMPANY,

Defendants.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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3 yes

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Statement

The appellees' brief shows that they have misread or misapprehended the appellant's complaint and brief. For reasons of their own, which they have not stated, the appellees have failed to address themselves to the issues on this appeal.

The appellees instead have chosen to assert in their brief at pp. 1, 4 that the appellant is seeking to "review...state court orders and a state judgment." That assertion simply is not so.

The Appellees at page 9 of their brief repeated the statement made by the District Court in its decision (8) that 'there is no constitutionally guaranteed right to a pre-judgment attachment.' If that statement was intended to mean that the Constitution does not declare that "prejudgment" attachments are constitutional rights per se, that is one thing. If, on the other hand, the appellees mean by that statement that "prejudgment" attachment, which is provided by the statutes of the State of New York, are not protected by the Constitution, and that the appellee can arbitrarily vacate an order of attachment regardless of due process and equal protection, then that is something else. Since the State of New York by statute authorizes the provisional remedy of attachment (it is only authorized prior to judgment) the Constitution requires that the statutes governing and providing for the grant, denial, or vacatur of an order of attachment, be applied equally, and in accordance with the process of law that is due therefor under the statutes.

The District Court, and the Appellees miss the point of the complaint also by the assertion that

> "any deprivation of rights which may have obtained from the unfavorable judgment of March 13th was self-imposed since plaintiff voluntarily refused to amend his complaint. There is no constitutionally protected right to litigate such matters." (8).

The District Court apparently overlooked the allegations of the complaint which show that the New York Supreme Court had no power, no authority, and no jurisdiction in the first place to dismiss the complaint for "vague and ambiguous" allegations (46-53) (Appellant's Brief pp. 22-26).

The deprivation of Dayon's Constitutional rights was caused by the arbitrary and unlawful order of Justice Massi dismissing the complaint when he had no power and no authority under the law to do so; and not by the refusal of Dayon to replead the Complaint.

Point I

The claims for relief are not insubstantial, allege deprivation of Dayon's Constitutional rights under 42 U.S.C. Section 1983, and may not be dismissed.

As set forth in Appellant's brief at p. 15:

> "The appellant is not seeking appellate review in the federal court of mere errors by the named justices in the exercise of power and

> jurisdiction which they possessed under New York law, but rather, the appellant seeks in the federal court under the authority of 42 U.S.C. Section 1983 and 28 U.S.C. Section 1343(3), declaratory and injunctive relief under 28 U.S.C. Sections 2201 and 2283, because of violations and deprivations of appellant's constitutional rights by these Justices acting under color of state law by the arbitrary and illegal assumption of power and jurisdiction where they had no such power and jurisdiction under New York State law and by the exercise of unlawful and arbitrary power and jurisdiction contrary to the settled law of the State of New York."

Proskin v. County Court of Albany County, 30 N.Y. 2d 15, 19, 21 (1972) is instructive on the issue that a court exceeds its jurisdiction and acts without authority when it bases its order upon a ground outside of the law upon which it depends and from which it derives the authority to act. Proskin, supra, shows that an order which is based upon such an unauthorized and unlawful ground is not a mere error of law in the exercise of jurisdiction, but that it is an arbitrary order made in excess of jurisdiction and without authority of law.

In Proskin, supra, a defendant in a criminal case, moved for an order granting leave to inspect the grand jury minutes under New York Criminal Procedure Law, Section 210.30 (2) which limits the power of a court to grant inspection, as follows:

> "A motion to inspect grand jury minutes is a motion by a defendant requesting the court to examine stenographic minutes of a grand jury proceeding resulting in an indictment for the purpose of determining whether the evidence before the grand jury was legally sufficient to support the charges or charge contained in such indictment. Such a motion must be in writing and the moving papers must allege there is reasonable cause to believe that the grand jury evidence was not legally sufficient to support a specified count or counts of the indictment, and must contain sworn allegations of fact supporting such claim. Such allegations of fact may be based either upon personal knowledge of the affiant or affiants or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief must be stated." Proskin v. County Ct. of Albany Co., 30 N.Y. 2d 15, 19, 20 (1972).

In the face of that statute, and basing his authority to act upon that statute, the County Court Judge

> "granted inspection, expressly stating that it was not necessary to discuss the grounds urged by Demeris. He inspected the minutes in camera but did not suggest that there was any doubt as to the sufficiency of the evidence to support the charges. He said Demeris would need the minutes to provide the information for the preparation of his defense. He also stated he was granting the motion in the interest of justice." Proskin v. County Court, supra, at p. 19.

Following the making of that order granting the defendant inspection of the entire Grand Jury minutes on those stated grounds, the District Attorney brought a proceeding for a writ of prohibition against the County Court Judge pursuant

to New York Civil Practice Law and Rules Article 78 contending that the said order was beyond the jurisdiction of the Court to grant.

The New York Court of Appeals held that since the County Court Judge had granted the defendant's motion to inspect the grand jury minutes upon a ground which was not within the statute, NYCPL Section 210.30(2), that he had acted without jurisdiction and in excess of his jurisdiction:

> "The cloak of secrecy accorded Grand Jury proceedings for the protection of the public, witnesses, potential defendants, and others may not be lifted for purposes of general unilateral discovery before a criminal trial (cases cited). Absent reason to believe that the evidence before the Grand Jury is insufficient or illegal, the court lacks authority because it lacks grounds to permit inspection (id.)....It is the authority to turn the minutes over to the defendant for general discovery which is lacking. Similarly, it is no answer to argue that if the motion court had granted limited inspection for the purpose of determining the sufficiency of the indictment, there would have been at most an abuse of discretion. The motion court has power to do for some purposes what it lacks power to do for others....The gravamen of this proceeding is the unwarranted disclosure solely for purposes of discovery of an entire Grand Jury investigation into municipal corruption involving persons, transactions, and crimes not related or attributed to the charged defendant....The nub of the matter is that the inspection of Grand Jury minutes in advance of trial is available only to attack the indictment, and may not be allowed only to assist the litigant in the trial which may ensue. To

> violate this principle by non-appealable order is to act without power, however categorized, and involves more than an error of law correctible on appeal in some later phase of the proceeding." Proskin v. County Court, 30 N.Y. 2d. 15, 20, 21 (1972).

New York Court of Appeals Associate Judge Stevens in his concurring opinion, wrote:

> "An article 78 proceeding in the nature of prohibition may be employed to restrain a court from acting in excess of its authorized powers in a proceeding under which it may actually have jurisdiction. (See, Matter of Lee v. County Ct. of Erie County, 27 N.Y. 2d 432, 436-437.) I merely state, therefore, that, when the County Judge in this case disavowed the grounds urged by the defendant in support of his application for inspection of the minutes of the Grand Jury, indicated no doubt as to the sufficiency of the evidence adduced before that body, and granted the inspection 'in the interest of justice' and to enable the defendant 'to prepare his defense', he unquestionably went beyond the limits of his power..." Proskin v. County Court, 30 N.Y. 2d 15, 21 (1972).

As more fully set forth in Appellant's brief at pp. 15-22, the first claim for relief set forth allegations that the appellees Appellate Division Justices, acting under color of law, vacated the Dayon order of attachment (34-37) on the ground that four of the six causes of action alleged in the Dayon complaint were insufficient as a pleading (36), that under the settled law of the State of New York, a complaint

as a pleading is totally and utterly unnecessary and forms no part whatever in the process of determination and a consideration thereof provides no power to determine whether an order of attachment may or may not be granted or vacated (38-44); that the vacatur of the Dayon order of attachment by the said appellees on that stated ground was illegal, arbitrary and beyond the jurisdiction of the appellees and deprived the appellant of federal Constitutional rights of due process of law and equal protection of the law (38-44; 58-71). The vacatur of the Dayon order of attachment by the appellees on that stated ground was on par with vacating the order of attachment on the ground that it was Monday, or that the appellant wore a green suit.

The Supreme Court in Wolf v. McDonnell, 418 U.S. 539, 558 (1973) held that

> "The touchstone of due process is protection of the individual against arbitrary action of government. Dent v. West Virginia, 129 U.S. 114, 123 (1889)."

The Supreme Court in Scheuer v. Rhodes, 416 U.S. 232, 250 (1973) showed that where the allegations of the complaints before it placed in issue whether state officers were acting within the scope of their duties under State law, whether they acted within the range of discretion of their

office, under state law, and whether they acted in good faith under the circumstances, then such allegations sufficiently alleged a substantial claim in violation of federal rights requiring that the complaints may not be dismissed and that

> "proceedings either by way of summary judgment or by trial on the merits, are required. The complaining parties are entitled to be heard more fully than is possible on a motion to dismiss a complaint."

The Supreme Court in Scheuer v. Rhodes, 416 U.S. 232, 248, 249 (1973) quoting from Sterling v. Constantin, 287 U.S. at 397 stated:

> "'...where there is a substantial showing that the exertion of state power has overridden private rights secured by that Constitution, the subject is necessarily one for judicial inquiry in an appropriate proceeding directed against the individuals charged with the transgression'. Id., at 397-398."

The Supreme Court in Scheuer v. Rhodes, 416 U.S. 232, 235 (1973), in reversing the orders below which, before answer, had granted defendants' motion to dismiss the complaint which was brought under 42 U.S.C. Section 1983, for lack of jurisdiction over the subject matter made it clear that this issue is to be decided on the allegations or "claims" of the complaint; the Supreme Court identified the controlling elements of those complaint allegations or "claims" as follows:

> "Both complaints allege that the action was taken 'under color of state law' and that it deprived the decedents of their lives and rights without due process of law. Fairly read, the complaints allege that each of the named defendants, in undertaking such actions, acted either outside the scope of his respective office or, if within the scope, acted in an arbitrary manner, grossly abusing the lawful powers of office.... The complaints in both cases allege a cause of action under the Civil Rights Act of 1871, 17 Stat. 13, now 42 U.S.C. Section 1983..." Scheuer v. Rhodes, 416 U.S. 232, 235, 234 (1973).

The jurisdiction of the District Court is determined by the "claims" made in the complaint, regardless of whether the plaintiff may or may not be able to establish those claims by proof:

> "When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.
>
> > 'In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless

> it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted).
>
> See Also, Gardner v. Toilet Goods Assn., 387 U.S. 167, 172 (1967)." Scheuer v. Rhodes, 416 U.S. 232, 236, 237 (1973).

This Court of Appeals in Judy C. Egelston v. State University College at Geneseo, et al, Docket No. 76-7047, decided June 7, 1976, in vacating an order dismissing a complaint, held:

> "It is well to set forth at the outset several general considerations that guide our disposition of this appeal. In our recent opinion in Heyman v. Commerce & Industry Ins. Co., 524 F. 2d 1317, 1320 (2d Cir. 1975), we emphasized that summary judgment must be used sparingly 'since its prophylactic function, when exercised, cuts off a party's right to present his case to the jury'. Dismissal of a complaint--before any discovery has taken place or an answer filed--is even more drastic. It is a device that must not be employed unless, taking as true the allegations pleaded, Cooper v. Pate, 378 U.S. 546 (1964) it
>
> 'appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'
>
> Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)."

The complaint herein is not "insubstantial", and

may not be dismissed. Hagans v. Levine, 415 U.S. 528 (1973).

Point II

The rule of Rooker v. Fidelity Trust Co. does not apply.

The motion to the District Court by the appellees to dismiss the complaint pursuant to Fed. Rules Civ. Procedure, Rule 12(b)(1), 28 U.S.C.A. was based solely on the rule of Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). That rule is totally inapplicable to this case for the simple reason that, as stated in appellant's brief at page 5:

> "'the plaintiff has never before commenced any action, either in any State court, or in any federal court, to vindicate the constitutional rights sought to be vindicated by this action.' (17, 18)."

The argument of the appellees in their brief in reliance on Rooker v. Fidelity Trust Company, 263 U.S. 413 (1923) (Appellees Brief pp. 4-10) includes an argument at pp. 9-10, that as to

> "his state court action by Justice Massi...Neither the complaint nor the record shows that he ever obtained one level of state appellate review of Justice Massi's final judgment dismissing the complaint."

This argument is not pointed to any rule or principle of law, and is therefore not understood as to its relevance for this appeal.

However, in the event that the appellees are arguing for the principle of exhaustion, then the short answer is that under existing decisions of the Supreme Court, the exhaustion requirement does not apply to claims made under 42 U.S.C. Section 1983. Gibson v. Berryhill, 411 U.S. 568, 574, 575, 581 (1973), citing McNeese v. Board of Education, 373 U.S. 668, 671-672 (1963); Damico v. California, 389 US. 416 (1967); also Bacon v. Rutland R. Co., 232 U.S. 134 (1914); City Bank Farmers Trust Co. v. Schnader, 291 U.S. 24 (1934).

The appellees' argument is obscure and appears to be wide of the mark on this appeal. The appellant's fourth claim for relief alleges that by reason of the arbitrary and illegal action of the appellees, Dayon was deprived of his Constitutional right to due process of law and equal protection of law by being deprived of his state statutory right to appeal the described state court order and state court judgment, which right of appeal was available to and was accorded to all others in similar circumstances. (53-54; Appellant's Br. pp. 26-28).

The facts show that on February 13, 1973 the appellees Appellate Division Justices vacated the Dayon order of attachment on the ground that

"as to the first four causes of action pleaded, the complaint is patently deficient" (134) (Dayon v. Downe Communications, 41 A.D. 2d 937).

That order of the Appellate Division vacating the order of attachment did not finally determine the action and under NYCPLR was not appealable as of right to the New York Court of Appeals. Van Arsdale v. King, 155 N.Y. 325 (1898). Since it was not a final order, it was certainly not appealable to the United States Supreme Court (28 U.S.C. Section 1259) on the principle that the Appellate Division was the highest state court to which an appeal could have been taken. (Notwithstanding, Dayon applied to that Appellate Division for leave to appeal to the New York Court of Appeals. The Appellees denied leave to appeal by order dated February 21, 1973) Thereafter, Justice Massi in a different court and on a different motion made his order dated February 23, 1973 dismissing the complaint for "vague and ambiguous allegations". (48; 46-53) (Appellant's Brief, pp. 22-26). Justice Massi followed that with a judgment dated March 13, 1973 (53). Dayon filed a notice of appeal to the Appellate Division from the Justice Massi's order dated February 23, 1973. After the judgment Dayon filed a notice of appeal to the New York Court of Appeals from Justice Massi's judgment dated March 13, 1973 (53). The appeal to the New York Court of Appeals was taken on the additional

ground of NYCPLR 5601(d), seeking to bring up for review the order of the Appellate Division dated February 13, 1973 which had vacated the Dayon order of attachment. On motion, the New York Court of Appeals dismissed the appeal (Dayon v. Downe Communications, 32 N.Y. 2d 937), on the ground that the Appellate Division order dated February 13, 1973 "did not necessarily affect the final judgment" (141). (Dayon thereupon filed a second notice of appeal from Justice Massi's judgment, this time to the Appellate Division.) On motion at the Appellate Division, the Appellate Division thereafter dismissed the Dayon appeal from Justice Massi's order and dismissed the appeal from Justice Massi's judgment. The dismissal of the Justice Massi order was made on the ground that the Justice Massi order had been superseded by the Justice Massi judgment; the dismissal of the Massi judgment was on the ground that the notice of appeal was untimely. The appellant's fourth claim for relief is that the action of the Appellate Division was arbitrary and illegal in violation of appellant's Constitutional rights (supra, p. 13 ; 53-54; Appellant's Br. pp. 26-28). The Appellate Division thus neatly closed the courthouse doors against Dayon. See, Brinkerhoff-Faris Trust Co. v. Hill, 281 U.S. 673 (1930).

It is notable that New York State Constitution, Article 6, Section 5(b) provides:

> "If any appeal is taken to an appellate court which is not authorized to review such judgment or order, the court shall transfer the appeal to an appellate court which is authorized to review such judgment or order."

Notwithstanding that self-executing state constitutional provision, Mahopec Hospital v. Central School District, 29 A.D. 2d 948 (2nd Dept. 1968); Pantel v. Catherwood, 35 A.D. 2d 681 (3rd Dept. 1970), the New York Court of Appeals did not transfer the appeal in this case to the Appellate Division, which would have preserved the timeliness of the appeal from that judgment. [The practice of the United States Supreme Court is to preserve such appeals by remanding the case to the lower court in order to have a fresh order made so as to preserve the right of appellant to make a timely appeal to the correct court: Gonzales v. Automatic Employees Credit Union, 419 U.S. 90, 101 (1974); United States v. Fruehauf, 365 U.S. 146, 158, 159 (19); see, also United States v. Wayne Pump Co., 317 U.S. 200, 209-210 (1942); United States v. Swift & Co., 318 U.S. 442,445 (1942).]

The appellees' reference at page 2 of their brief to the New York Court of Appeals order (dated June 7, 1973)

which appears at page 141 of the Appendix, identifies it as an order dismissing a direct appeal by Dayon to the New York Court of Appeals from the Appellate Division order dated February 13, 1973 which vacated the Dayon order of attachment. That is incorrect, as shown above at pp. 15. The order at Appendix page 141 was a dismissal of the direct appeal of the Massi judgment directly from the New York County Supreme Court to the New York Court of Appeals under NYCPLR 5601(d). (Dayon v. Downe Communications, 32 N.Y. 2d 937).

The appellees' statement in their brief at page 3 that

> "No appeal was ever taken from Justice Massi's order, as far as appears from the complaint or appendix"

is also incorrect, as the foregoing shows.

The cases cited by the appellees in opposition to this appeal are based on the principle of Rooker v. Fidelity Trust Company, 263 U.S. 413 (1923). As noted above, they are inapplicable to this case.

Conclusion

The District Court order should be reversed.

Dated: June 14, 1976

Respectfully submitted,

Charles Sutton

CHARLES SUTTON